The Matrimonial Property Act: Valuation Date

REPORT FOR DISCUSSION 25

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This Report for Discussion by the Alberta Law Reform Institute (ALRI) explores whether the Matrimonial Property Act should include an express date for valuing property and what that date should be.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to any or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

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Alberta Law Reform Institute

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Summary

Alberta's *Matrimonial Property* Act [MPA] was enacted in 1978 as a mechanism for distributing property between spouses following marriage breakdown. The term "valuation date" refers to the date at which the matrimonial property is valued for the purpose of division between the spouses. The value of the matrimonial property and, as a result, the appropriate valuation date, is an important aspect of the property division process. However, the MPA does not specify a valuation date. Thus, the task of interpreting the legislation and establishing a valuation date has been left to the judiciary.

Alberta courts have given extensive consideration to the appropriate valuation date under the MPA. Until 2005, *Mazurenko v Mazurenko* was the leading case on the issue. There, the Alberta Court of Appeal determined that there was a general principle implicit in the MPA that valuation should be done at trial. Subsequent lower court decisions interpreted this to mean that valuation as at the date of trial was a presumptive rule that could be deviated from in special circumstances.

However, in 2005 in *Hodgson v Hodgson*, the Court of Appeal clarified that matrimonial property must be valued as at the date of trial; it was not a presumption that could be rebutted.

In 2010, ALRI funded a case law review by University of Calgary Faculty of Law Professor Jonette Watson-Hamilton and student Annie Voss-Altman. They reviewed ten years of case law under the MPA to determine where the legislation was problematic. One of the most problematic areas identified was the use of the date of trial as a valuation date. Accordingly, ALRI decided to undertake this project in order to determine whether the valuation rule enunciated in *Hodgson* should be changed to reflect the date of separation as the default valuation date under the MPA.

Most Canadian jurisdictions expressly specify the applicable valuation date directly in their matrimonial property legislation. Further, an express, legislated statement regarding valuation date is easier for self-represented litigants to find and understand. Therefore, to provide consistency with other jurisdictions and to simplify the law, the MPA should expressly specify a valuation date for matrimonial property.

This Report for Discussion makes three preliminary recommendations. First, the MPA should expressly indicate that spouses are able to agree on their own valuation date. Second, if

spouses cannot agree the default date for valuation should be separation. Third, the ability to respond to post-separation changes in property is best achieved by using the factors found in section 8 of the MPA. The basis for these recommendations is set out below.

Agreed Valuation Date

Whenever possible, spouses should be encouraged to agree on a valuation date. It is only in circumstances where they cannot agree that a default date would become applicable. The ability to choose one's own valuation date facilitates settlement, reduces cost and delay, and signals the end of the spouses' economic partnership. Further, it allows the spouses to take into account what information they have, and what is still required for an accurate valuation. Thus, the MPA's express statement as to valuation date should indicate that the spouses are permitted to choose their own valuation date. However, failing such agreement, the default valuation date will be the date of separation.

Default Valuation Date

In choosing between the separation date and the trial date as the appropriate default, ALRI considered the following factors: promoting reconciliation, reducing cost, facilitating settlement, decreasing delay, the accuracy of the information available to the parties and the appropriate end of the economic partnership. Ultimately, it is ALRI's preliminary recommendation that the date of separation should be expressly included in the MPA as the default valuation date.

While using the separation date may not promote reconciliation, ALRI considers that the date of separation is more appropriate for many reasons. First, it is more conducive to settlement because the spouses are not forced to negotiate backwards from an unknown trial date and an unknown valuation. Second, it will reduce cost and delay. Updated valuations will be less relevant and neither spouse will have an incentive to delay in order to benefit from changes in property values. Third, the valuation information that will form the basis of the spouses' negotiations should be fairly accurate, provided that valuation is done in a timely manner. Finally, it signals the end of the spouses' economic partnership.

Post-valuation Changes

The drawback of using separation date for valuation is that it does not accommodate post-separation changes in value. In most instances, such changes will not be relevant to the division of the matrimonial property, especially where the spouses have agreed on

the valuation. However, in some circumstances it will be just and equitable to take changes in value into account. In such instances the factors outlined in section 8 of the MPA provide the court with sufficient tools to make an appropriate division.

Recommendations

RECOMMENDATION 1

The *Matrimonial Property Act* should expressly provide that spouses may agree on a valuation date. 20

RECOMMENDATION 2

If spouses do not agree on a valuation date, the *Matrimonial Property Act* should expressly provide that the default valuation date will be the date of separation. 20

RECOMMENDATION 3

Flexibility to respond to post-valuation property changes is best achieved by applying the factors in section 8 of *the Matrimonial Property Act*. 26

Table of Abbreviations

LEGISLATION

MPA	*Matrimonial Property Act*, RSA 2000, c M-8

CASES

Hodgson	*Hodgson v Hodgson*, 2005 ABCA 13

LAW REFORM PUBLICATIONS

Background Paper	Alberta Law Reform Institute, *Matrimonial Property Legislation: Valuation Dates*, Background Paper (2005)
Saskatchewan Report 1985	*Proposals Relating to Matrimonial Property Legislation*, Report (1985)
Saskatchewan Report 1996	Law Reform Commission of Saskatchewan, *The Matrimonial Property Act: Selected Topics*, Report (1996)
Ontario Report	Law Reform Commission of Ontario, *Report on Family Property Law*, Final Report (1993)

CHAPTER 1

Introduction

A. Background

[1] The *Matrimonial Property Act* [MPA] was enacted in 1978.[1] Since then, the *Divorce Act* has undergone significant reform and made it easier for spouses to end a marriage and to do so without a court finding of fault.[2] There have also been significant changes to economic, political, and social attitudes and expectations regarding the distribution of property between spouses on marriage breakdown. Changes in the culture of litigation and an increased emphasis on settlement and party controlled dispute resolution have reduced the need to rely on court adjudication in many cases. Despite these significant changes, the MPA has been largely unchanged during the last 35 years.

[2] In 2005, ALRI produced a background paper *Matrimonial Property Legislation: Valuation Dates*.[3] That paper considered whether the then recent Court of Appeal decision in *Hodgson v Hodgson* charted an appropriate path for Alberta in setting trial as the valuation date for matrimonial property division.[4] While the MPA does not expressly set out a valuation date, the Court of Appeal found that, by implication, various components of the MPA pointed to the trial. However, even before *Hodgson*, valuation at the trial was seen to encourage delay and discourage settlement in many instances. The 2005 background paper and concurrent focus groups highlighted the implications of retaining trial over separation and other options. Given the recency of *Hodgson* in 2005, it seemed appropriate to take a wait-and-see approach to observe whether the implied valuation date worked well in practice.

[3] In 2010, ALRI funded a case law review carried out by Professor Jonette Watson Hamilton and Annie Voss-Altman of the University of

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[1] *Matrimonial Property Act*, RSA 2000, c M-8 [MPA].

[2] *Divorce Act*, RSC 1985, c 3 (2nd Supp).

[3] Alberta Law Reform Institute, *Matrimonial Property Legislation: Valuation Dates*, Background Paper (2005), online: <www.alri.ualberta.ca/docs/bpMPA.pdf> [Background Paper].

[4] *Hodgson v Hodgson*, 2005 ABCA 13 [*Hodgson*].

Calgary.[5] The review looked at ten years of case law under the MPA to determine where the Act was problematic. While the review turned up many areas of concern, one of the areas that was most problematic was valuation date.

[4] More recently, ALRI had an opportunity to discuss valuation date with practitioners attending matrimonial property seminars held by the Legal Education Society of Alberta in Edmonton and Calgary in November 2013 and with the Central Alberta Bar Society in May 2014. The feedback from those discussions has been helpful in understanding the issues under review in this report.

[5] Before exploring issues specifically related to valuation date, this report briefly addresses the current provisions for dividing matrimonial property under the MPA.

B. Property Division under the MPA

[6] Section 7 of the MPA governs the distribution of all property owned by both spouses and by each of them.[6] The right to divide this property arises on divorce, nullity of marriage, judicial separation, a declaration of irreconcilability, separation for at least a year, or separation accompanied by dissipation or improper transfers or gifting of property as provided in section 5.

[7] The Court of Appeal of Alberta has described the underlying purpose of the MPA as a means to "legally recognise marriage as an economic partnership, founded on the presumption that the Parties intend to share the fruits of their labour during and as a result of it, on an equal basis."[7]

[8] This presumption of equal sharing is articulated in section 7(4) of the MPA for the division of property acquired during the marriage:

> **7(4)** If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in

---

[5] Jonette Watson Hamilton & Annie Voss-Altman, "The *Matrimonial Property Act*: A Case Law Review," Research Paper (2010), online: Alberta Law Reform Institute <www.alri.ualberta.ca/docs/OP MPA Case Law.pdf>

[6] MPA, s 7(1).

[7] *Jensen v Jensen*, 2009 ABCA 272 at para 1.

> subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

[9] As indicated in section 7(4), the presumption of equal sharing does not apply to the division of property referred to in sections 7(2) and (3). Section 7(2) specifies types of property that are exempt from equal sharing:

> **7(2)** If the property is
>
> (a) property acquired by a spouse by gift from a third party,
>
> (b) property acquired by a spouse by inheritance,
>
> (c) property acquired by a spouse before the marriage,
>
> (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
>
> (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,
>
> the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from a distribution under this section.

[10] Section 7(3) gives the court discretion to divide other types of property in a just and equitable manner, including increases in the value of exempt property:

> **7(3)** The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:
>
> (a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired
>
> (i) as a result of an exchange for the original property, or

(ii) from the proceeds, whether direct or indirect, of a disposition of the original property;

(b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);

(c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage, a judgment of judicial separation or a declaration of irreconcilability under the *Family Law Act* is made in respect of the spouses;

(d) property acquired by a spouse by gift from the other spouse.

[11] As noted, the section 7(4), presumption of equal sharing may be displaced if the court concludes that equal division would be unjust or inequitable. When matrimonial property is not shared equally as per section 7(3) or (4), the court must consider twelve factors set out in section 8 of the MPA:

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

(a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;

(c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;

(d) the income, earning capacity, liabilities, obligations, property and other financial resources

(i) that each spouse had at the time of marriage, and

(ii) that each spouse has at the time of the trial;

(e) the duration of the marriage;

(f) whether the property was acquired when the spouses were living separate and apart;

(g) the terms of an oral or written agreement between the spouses;

(h) that a spouse has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

(l) that a spouse has dissipated property to the detriment of the other spouse;

(m) any fact or circumstance that is relevant.

There is no express formula for applying these factors.[8]

[12] The Alberta Court of Appeal has outlined a four-step process for the division of matrimonial property under the MPA.[9] The first step involves determining all of the property that the spouses own at the date of trial. Second, any property that is exempt as per section 7(2) should be identified and its market value should be excluded from distribution. Third, property subject to section 7(3) should be identified and distributed between the spouses in a manner that is just and equitable. The division of this property is within the discretion of the trial judge, taking into account the factors in section 8 and is not subject to a presumption of equal sharing. Lastly, the remaining assets should be divided equally, unless an equal division would not be just and equitable after considering the factors outlined in section 8.

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[8] See *Jenson v Jenson*, 2009 ABCA 272 at para 18.

[9] *Hodgson*, note 4 at paras 19–24.

CHAPTER 2

Valuation Date

[13] The valuation date is when matrimonial property is valued for the purposes of division between the spouses. It serves as a cut-off date for determining the property from the marriage that is to be shared. The valuation date has also been conceptualized as the "date on which the economic partnership between the spouses comes to an end...."[10]

A. Valuation Date in Alberta

[14] The MPA does not expressly specify what date should be used to value matrimonial property. However, Alberta courts have addressed this issue extensively.

[15] In 2005, the Court of Appeal of Alberta held in *Hodgson* that matrimonial property must be valued and divided as of trial. The Court also directed that if there were any concerns with respect to using trial as the valuation date, those concerns could be addressed using the factors set out in section 8 of the MPA when dividing the property.[11]

[16] Prior to *Hodgson*, the leading case on valuation date was *Mazurenko v Mazurenko*.[12] The Court of Appeal concluded in *Mazurenko* that in the absence of an express provision stating the applicable valuation date, there was a "general principle that valuation be made at trial." Based on that terminology, subsequent lower courts found that valuation and division as of trial was a presumptive rule that could be departed from in special circumstances.[13]

[17] The Court of Appeal's decision in *Hodgson* makes it clear that courts are now "obliged to divide the matrimonial property as of the date

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[10] Berend Hovius, "Market Driven Changes in Property Values after the Valuation Date under Ontario's *Family Law Act*: The Story Continues" (2009) 28 Can Fam LQ 105 at 105.

[11] *Hodgson*, note 4 at paras 32–33.

[12] *Mazurenko v Mazurenko*, [1981] 30 AR 34 at para 15.

[13] See, for example, *Hodgson* vs *Hodgson*, 2002 ABQB 628 at para 28. The Court did not use trial as the valuation date due to special circumstances, including that the spouses' separation exceeded 11 years, the husband and wife led independent lives between separation and trial, and the substantive change to the spouses' financial circumstances since their separation.

See also the summary of the law in *Kazmierczak v Kazmierczak*, 2001 ABQB 610 at paras 50–61.

of trial" and that "[t]his is not a rebuttable presumption but a rule of division."[14]

[18] In *Hodgson*, the Court of Appeal notes that several provisions in the MPA implicitly support valuing property as of trial. Those provisions include:

- section 7(1): The Court notes that the plain meaning of this section entitles a trial judge "to determine the scope of divisible assets at the time that the matter comes before him or her -- the time of trial."[15]
- section 7(3)(a): The Court notes that the MPA requires the Court to distribute any increase in the value of exempted property that occurs during the marriage. The value of that property is determined by subtracting the exempted value of the property described in section 7(2) from its market value at trial. As noted by the Court of Appeal, "it is necessary to determine the value of that property as at the date of trial in order to ascertain the amount of property distributable under section 7(3)(a)."[16]
- section 7(3)(c): The Court observed that this section permits property acquired after divorce but before the division of property under the MPA to be divided between the spouses.[17]
- section 8(d): As this section requires the court to take into account property and other financial resources that each spouse had at trial, the Court concluded that this requirement "comes close to being a statement of legislative intent that the date for the valuation and division of matrimonial property should be the date of trial."[18]
- section 8(f): This section contemplates the division of property after the spouses have separated, as it requires the Court to

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[14] *Hodgson*, note 4 at para 32.

[15] *Hodgson*, note 4 at para 12.

[16] *Hodgson*, note 4 at para 13.

[17] *Hodgson*, note 4 at para 14.

[18] *Hodgson*, note 4 at para 16.

consider property acquired while the spouses have been living separate and apart.[19]

B. Valuation Dates in Canada

The table below shows that most Canadian jurisdictions specify the applicable valuation date in matrimonial property legislation, and that the majority of Canadian jurisdictions value matrimonial property as of separation rather than trial. In some jurisdictions, separation is one of several potential valuation dates that may be used. While trial is used as a valuation date in fewer Canadian jurisdictions, Alberta is not the only jurisdiction to value and divide matrimonial property at trial.[20] There is no data to indicate whether one valuation date produces fairer results.[21]

Date of valuation	Jurisdiction	Legislation
Earliest of the following dates: ▪ date of separation ▪ date divorce or declaration of nullity is granted ▪ date an application to prevent the improvident depletion of assets is commenced	Ontario	*Family Law Act*, RSO 1990, c F.3, s 4(1), "valuation date"
	Prince Edward Island	*Family Law Act*, RSPEI 1988, c F-2.1, s 4(1)(d)
	Yukon	*Family Property and Support Act*, RSY 2002, c 83, ss 15(3) and 6(2)
	Northwest Territories	*Family Law Act*, SNWT 1997, c 18, s 33, "valuation date"
	Nunavut	*Family Law Act*, SNWT (Nu) 1997, c 18, s 33, "valuation date"
Either when the spouses cease cohabitating or the application is brought (in the event cohabitation continues)	Manitoba	*Family Property Act*, CCSM c F25, s 16
Goal is to achieve division as of true separation date; court	Nova Scotia	N/A

[19] *Hodgson*, note 4 at para 16.

[20] A variety of valuation dates are used in the United States as well. Valuation dates vary from state to state, and include separation, application, trial and dissolution. In some states, the valuation date may be set by the court. See Toni Hendricks, "Comment, Valuation Date in Divorces: What a Difference a Date Can Make" (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 747.

[21] See Background Paper, note 3 at para 58.

has discretion to determine the date of division for each asset		
Separation for non-marital property and trial for marital property; valuation date may be selected on an asset by asset basis	New Brunswick	N/A
As agreed or at the hearing	British Columbia	*Family Law Act*, SBC 2011, c 25, s 87(b)
Application or adjudication	Saskatchewan	*Family Property Act*, SS 1997, c F-6.3, s 2(1), "value"
Retroactively to the application	Quebec	*Civil Code of* Québec, LRQ, c C-1991, art 465
Implementation of division of property	Newfoundland & Labrador	N/A

C. Law Reform Recommendations

[19] Four Canadian law reform agencies have considered the issue of valuation dates.

1. NOVA SCOTIA

[20] In a 1997 report, the Law Reform Commission of Nova Scotia recommended having Nova Scotia's matrimonial property legislation articulate a presumption that the valuation date is separation. In making this recommendation, the Commission noted that separation should not be a rule, and that courts should be able to depart from separation and use an earlier or later date where circumstances justify it. The Commission specifically noted that using an absolute valuation date has proven inconvenient in other provinces.[22]

[21] The recommendations of the Law Reform Commission of Nova Scotia were not adopted in the *Matrimonial Property Act*.[23] Nova Scotia continues to apply a valuation date established through case law.

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[22] Law Reform Commission of Nova Scotia, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, Final Report (1997) at 30. The Commission noted that Nova Scotia's matrimonial property legislation at that time did not state a valuation date, but that the general practice of the Nova Scotia courts was to value matrimonial property as of the date of separation.

[23] *Matrimonial Property Act*, RSNS 1989, c 275.

2. SASKATCHEWAN

[22] In both 1985 and 1996, the Law Reform Commission of Saskatchewan considered valuation dates.[24] Initially, the Commission recommended changing the valuation date from application or adjudication to separation, noting that separation is "the logical date for determining the value of matrimonial property," as this is "[w]hen the spouses go their separate ways, the marriage partnership is over, and joint contribution ceases."[25] The Commission noted, however, that if separation was used to value matrimonial property, adjustments would be necessary prior to distribution if the value of the property increased or decreased after separation: [26]

> The courts must distinguish between increases in the value of matrimonial property that result from contributions made after separation (such as income earned from employment), and increases in the value of existing assets. An increase in value due to market forces or inflation after the date of separation should be shared. On the other hand, income earned from employment by a spouse between the date of separation and the date of the matrimonial property order should not be divided.

[23] In 1996, the Commission changed its recommendation, noting that separation is a less precise valuation date than application.[27] The Commission also observed that arguments to adopt separation would be stronger if the length of the separation was not a relevant factor to consider when departing from an equal division of matrimonial property.[28]

[24] The Commission instead recommended that Saskatchewan's legislation give direction as to when property should be valued as of application, and when property should be valued as of adjudication. Due

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[24] Law Reform Commission of Saskatchewan, *The Matrimonial Property Act: Selected Topics*, Report (1996)[Saskatchewan Report 1996] and *Proposals Relating to Matrimonial Property Legislation*, Report (1985)[Saskatchewan Report 1985].

[25] Saskatchewan Report 1985, note 24 at 14. This recommendation was made specifically in regard to spouses who were no longer cohabitating.

[26] Saskatchewan Report 1985, note 24 at 15.

[27] Saskatchewan Report 1996, note 24 at 18-19. The Report acknowledges the prior recommendation from 1985, and notes that determining the separation date has proven to be difficult in provinces where property is valued as of the separation date.

[28] Saskatchewan Report 1996, note 24 at 19.

to the lack of direction in the legislation, the Commission was concerned that the choice in valuation dates created uncertainty, which could lead to delay, expense, inconsistent results, and diminish the possibility of settlement.[29]

[25] Saskatchewan's *Matrimonial Property Act* was replaced with *The Family Property Act*. The provisions in the legislation regarding valuation dates were not changed. [30] The Commission's recommendations on valuation dates have not been implemented. Saskatchewan retains valuation as of the application or adjudication date.

3. ONTARIO

[26] The Ontario Law Reform Commission considered valuation dates in 1993.[31] The Commission noted that because the courts do not have discretion to vary the valuation date in Ontario, the courts had begun to resort to constructive trusts to distribute any significant change in the value of matrimonial property that occurred between valuation and trial. The Commission noted that such unjust enrichment claims were contrary to the purpose of specifying the valuation date in Ontario's legislation, the purpose being to provide certainty and discourage litigation.[32] The ultimate policy consideration that the Commission highlighted was whether couples should share in post-separation changes in the value of matrimonial property, and if so, whether spouses should share in all changes in value, regardless of their cause.[33]

[27] The Commission ultimately did not recommend changing the valuation date provision in Ontario's legislation.[34] Potential options that

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[29] Saskatchewan Report 1996, note 24 at 9.

[30] *The Matrimonial Property Act*, SS 1979, c M-6.1, s 2(l); *The Family Property Act*, SS 1997, c F-6.3, s 2(1).

[31] Law Reform Commission of Ontario, *Report on Family Property Law*, Final Report (1993) [Ontario Report].

[32] Ontario Report, note 31 at 52. In fact, the Commission went on to note at 56 that the essential issue is resolving tension between the need to achieve consistency and predictability and the desire to ensure that individuals receive fair treatment.

[33] Ontario Report, note 31 at 57.

[34] The Commission recommended amending the legislation to give Ontario courts the discretion to vary an equalization payment to recognize substantial changes in the value of assets after the valuation date if necessary to ensure an equitable result, having regard to the cause of the fluctuation in value. See Ontario Report, note 31 at 59, 71, 144. The Commission was cognizant that

Continued

the Commission ruled out included trial and court discretion to select an appropriate valuation date. In terms of changing the valuation date to trial, the Commission noted concerns of spouses attempting to delay trial depending market speculation. If courts were given discretion to select a valuation date, the Commission was concerned that courts could become embroiled in a factual inquiry on causation in many cases, depending on whether or not there was a gain or loss in the value of matrimonial property. The Commission noted that such an inquiry would add to the length and costs of litigation.[35]

D. Valuation Date and the MPA

[28] While the Court of Appeal of Alberta made it quite clear in *Hodgson* that the valuation date in Alberta is trial, amending the MPA to expressly include a valuation date could be advantageous for a number of reasons. For example, it would be easier for self-represented litigants to find the valuation date if stated in the MPA rather than in case law. An express legislated statement may also be advantageous for lawyers. Despite the Court of Appeal's decision in *Hodgson*, it appears that lawyers and the courts still occasionally grapple with the issue of which valuation date to use. Moreover, this change would be consistent with legislation in other Canadian jurisdictions. As noted above, most jurisdictions expressly specify the valuation date in legislation.

E. Choosing a Valuation Date

ISSUE 1

Should the *Matrimonial Property Act* expressly provide that spouses may agree on a valuation date?

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changes in value due to market forces, for example, should be treated differently than changes in value due to the agency or efforts of one spouse. See at 57.

It appears that the Commission's recommendation was not implemented. See the *Family Law Act*, RSO 1990, c F.3, s 5(6).

[35] Ontario Report, note 31 at 58–59.

ISSUE 2

If spouses do not agree on a valuation date, should separation be the default valuation date?

[29] There are a variety of valuation dates that could be used to mark the end of the spouses' economic partnership, including trial, separation, an application, division of property, or an agreed date. Regardless of what valuation date is selected for the MPA, ALRI considers that spouses should be permitted to have their property valued as of an agreed date. Allowing the spouses the ability to choose their own valuation date is consistent with promoting settlement and a party driven dispute resolution process.

[30] In addition to allowing spouses to agree on a valuation date, the MPA would still need a default date that would apply where spouses do not agree. In terms of potential valuation dates that could be specified in the MPA, this report focuses on two potential dates – trial and separation.

[31] For the purposes of determining which valuation date is preferable as a default it is useful to consider the following factors:

- reconciliation
- cost
- settlement
- delay
- accuracy of information
- end of the economic partnership

1. RECONCILIATION

[32] It is important to bear in mind that spouses have the option to reconcile after separation. Valuation as of separation may not encourage reconciliation as it requires spouses to think about proceeding to property division. On the other hand, allowing spouses to choose a valuation date may facilitate opportunities for reconciliation. So too may valuation at a more distant trial date.

2. COST

[33] ALRI's 2005 background paper notes concern among practitioners that valuing matrimonial property as of trial increases the cost of dispute resolution.[36] This increase has been linked to the fact that the trial is a moving target. Until trial, the date as of which the property must be valued and the property's respective value are uncertain. As a result, spouses often need to have their matrimonial property valued more than once. For example, if the spouses have the property valued early for the purpose of entering settlement discussions, that valuation will likely need to be updated for trial. Further updates may also be required if the trial is delayed or there is significant wait time for a trial.[37]

[34] If matrimonial property is valued as of separation, the spouses should only need to have their entire property valued once. This approach assumes that the spouses are able to agree on the date of separation. Similarly, it should only be necessary to have property valued once if spouses agreed on a valuation date. Ultimately, if matrimonial property is valued using a past date its value should not subsequently change for purposes of division. Therefore, it is probable that spouses would incur less expense if property was valued using separation as it would no longer be necessary to update property valuations prior to trial.[38] This same advantage would apply where spouses agree on a past date for valuation.

[35] The majority of seminar participants in Edmonton and Calgary confirmed that, in their view, it is more expensive to value matrimonial property as of trial than it would be to value it as of separation.[39]

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[36] Background Paper, note 3 at para 2.

[37] Background Paper, note 3 at paras 34, 37, 66.

[38] The court will continue to need to value certain pieces of property at two different points in time, even if the date of separation is used to value the property. For example, two valuations will be required when the court needs to determine whether s 7(2) exempt property has increased in value during the marriage.

[39] Over 64% of Edmonton participants indicated that they would agree or strongly agree that it is more expensive to value matrimonial property as of the date of trial. Eighty percent of Calgary participants indicated that they would agree or strongly agree that it is more expensive to value matrimonial property as of the date of trial.

As discussed in chapter 3, a change in circumstances may also lead to one or both spouses arguing that a change in the value of specific property should be taken into account.

3. SETTLEMENT

[36] In the 2005 background paper, another concern raised by practitioners was that valuing matrimonial property as of trial hinders settlement.

[37] Valuing matrimonial property as of separation may be more conducive to settlement. Neither party would derive a benefit from waiting to have the property valued at trial. The same advantage would result where spouses agree on a date for valuation.

[38] In contrast, valuing matrimonial property as of trial may discourage settlement discussions. For example, reluctance to provide updated property valuations may undermine settlement negotiations.[40] Further, it may be difficult for spouses to negotiate a settlement pertaining to the value of matrimonial property, given that the spouses must negotiate backwards from an unknown date and unknown property values.[41]

[39] Participants at both seminars concurred that valuing matrimonial property as of separation would be more conducive to settlement than valuation as of trial.

4. DELAY

[40] ALRI's 2005 background paper also notes concern that valuing matrimonial property as of trial can cause delays.[42] For example, a party may delay settlement if that party believes there is a benefit from doing so. For example, one spouse may wish to delay in the belief that the value of the other spouse's business will increase, which would result in the delaying spouse receiving a better value for the matrimonial property. Similarly, one spouse may wish to delay in the belief that the value of the property will decrease, resulting in the other spouse receiving less value.

[41] Delay may also occur in areas that are beyond the control of either party. For example, where valuation is to be done at trial whether a trial

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[40] Background Paper, note 3 at paras 34, 37, 66.

[41] See Background Paper, note 3 at para 58.

[42] Background Paper, note 3 at para 2.

date is available within six months or whether spouses may need to wait a year or longer will delay valuation.

[42] Finally, as noted above, delay may increase cost if the valuation needs to be repeated or updated.

[43] If matrimonial property is valued as of separation there should not be an incentive to delay. The same concept would apply if property were valued as of a date agreed by the spouses. [43]

5. ACCURACY OF INFORMATION

[44] While separation offers some certainty when the valuation is done early on, there may be challenges in establishing historic values many years after the spouses separate.[44] It may also be difficult to pinpoint the date of separation as separation can be a process that occurs over time. [45] However, the courts are frequently called upon to determine beginning and end dates for relationships under the *Adult Interdependent Relationships Act* and so a date can be established.[46]

[45] If property is valued as of trial, on the other hand, the courts should be able to get an accurate picture of the spouses' financial situations close to the time of distribution.[47] There also should be no ambiguity as to the date the action was tried, and therefore no ambiguity as to the valuation date.

6. END OF THE ECONOMIC PARTNERSHIP

[46] A further consideration is determining when the spouses' economic partnership ends. Considering the economic partnership to be at an end as of separation, may be more consistent with the separation process. Upon separation, it is common for the spouses to impose some type of interim distribution of matrimonial property.

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[43] The question of how post-valuation increases and decreases in property value should be dealt with is discussed later in this report.

[44] *Kazmierczak v Kazmierczak*, 2001 ABQB 610 at para 50.

[45] Background Paper, note 3 at para 60.

[46] *Adult Interdependent Relationships Act*, RSA 2002 c A-4.5.

[47] That said, no matter how accurate the picture that is presented, the property will never truly be valued as of the date of trial, as property appraisals must be completed prior to trial.

[47] Moreover, after separation, the conduct of spouses may no longer be conducive to an ongoing economic partnership. After the spouses separate and begin to live separate and apart, they may act in their own interests, rather than the interests of the partnership. This approach to separation may undermine arguments that matrimonial property should be divided as of trial. For example, during the seminar in Edmonton, it was noted that after separation, the spouses may prefer to spend income prior to trial rather than save it, to ensure that such income is not available to share with their former spouse by the time of trial.

[48] However, as noted by the Court of Queen's Bench, even if the spouses wish their economic partnership to be at an end as of separation, they often "are not totally independent" by that point.[48] For example, even after separation the spouses may continue to share property and make economic decisions together.[49] Indeed, in some cases some form of economic partnership may endure long after the divorce and formal property division.

7. RECOMMENDATIONS

[49] As noted earlier, ALRI recommends that the MPA should provide that spouses may agree on valuation date. In effect, this is what happens in many cases and it is appropriate and instructive to specify this option in the MPA.[50] Allowing the parties to agree on a valuation date is consistent with allowing the opportunity for reconciliation. An agreed date should also facilitate settlement, reduce cost and delay, and signal the end of the spouse's economic partnerships. In agreeing on a valuation date, spouses may also take into account what information they have and what information is required for an accurate valuation.

[50] It can be argued that the MPA section 37 is already broad enough in scope to allow the parties to agree on a valuation date.[51] While this may

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[48] *Kazmierczak v Kazmierczak*, 2001 ABQB 610, para 50.

[49] Background Paper, note 3 at para 60.

[50] It should also be noted that in *Hodgson*, the Court of Appeal observed that the MPA does not affect the freedom of the spouses to agree to a division based on a valuation at a date of their own choosing, as long as the agreement satisfies the conditions set out in sections 37 and 38 of the MPA.

[51] MPA s 37 provides:

> **Agreements between spouses**
>
> **37(1)** Part 1 does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into

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be, section 37 also aims to allow parties to provide for the complete division of their property. As such it may be daunting to consider section 37 for the simpler matter of agreeing on a valuation date. A separate, brief provision to alert spouses to the option of agreeing on a valuation date would be more accessible and might encourage further agreement under section 37. Although spouses are only agreeing as to valuation date it would still be appropriate for them to have independent legal advice as outlined in section 38.[52] However, given the limited scope of an agreement on valuation date, the section 38(1)(b) provision for giving up possible future claims is inappropriate and should not apply.

[51] However, there will be instances where spouses do not or cannot agree on a valuation date. In such circumstances, the MPA should provide a default date for valuation. On balance, ALRI considers that separation is the appropriate default valuation date. In most cases, separation should facilitate settlement as spouses are working forwards from a known valuation date rather than towards an uncertain future valuation. Cost and delay should be reduced as updates will be less relevant. Provided valuation is done in a timely manner the information should be fairly accurate. However, if spouses wait for a considerable period before having their property valued there may be problems arising from an

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a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property

(2) An agreement under subsection (1) may be entered into by 2 persons in contemplation of their marriage to each other but is unenforceable until after the marriage.

(3) An agreement under subsection (1)

(a) may provide for the distribution of property between the spouses at any time including, but not limited to, the time of separation of the spouses or the dissolution of the marriage, and

(b) may apply to property owned by both spouses and by each of them at or after the time the agreement is made.

(4) An agreement under subsection (1) is unenforceable by a spouse if that spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.

[52] MPA s 38 provides:

Formal requirements for agreement

38(1) An agreement referred to in section 37 is enforceable if each spouse or each person, in the case of persons referred to in section 37(2), has acknowledged, in writing, apart from the other spouse or person

(a) that the spouse or person is aware of the nature and the effect of the agreement,

(b) that the spouse or person is aware of the possible future claims to property the spouse or person may have under this Act and that the spouse or person intends to give up these claims to the extent necessary to give effect to the agreement, and

(c) that the spouse or person is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.

(2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or person or before whom the acknowledgement is made by the other spouse or person.

historic valuation. Valuation at separation may also be problematic from the perspective of facilitating reconciliation. While separation has some short comings as a default valuation date, it is more in keeping with the settlement focus of current matrimonial law practice. Moreover, where date of separation produces inappropriate results the spouses are free to agree on another date.

RECOMMENDATION 1

The *Matrimonial Property Act* should expressly provide that spouses may agree on a valuation date.

RECOMMENDATION 2

If spouses do not agree on a valuation date, the *Matrimonial Property Act* should expressly provide that the default valuation date will be the date of separation.

[52] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

CHAPTER 3

Post-valuation Changes

[53] Regardless of when property is valued, changes in value or in the pool of property post-valuation may lead to disputes for which the spouses seek court resolution. The changes may be due to the actions of one or both spouses or to market forces. The time difference since valuation may be relatively short or may be a span of years or even decades. Presuming that changes in the value of matrimonial property between separation and trial are to be shared seems appropriate when the change in value is due to forces outside the spouses' control, such as market conditions or a natural disaster.[53] However, such sharing may not be appropriate in other circumstances, such as when between separation and trial, the value of a matrimonial asset increases due to the labours of one spouse, or plummets as a result of one spouse's mismanagement. Given the variability in the circumstances, how best can the court retain flexibility to respond to property changes in appropriate circumstances?

ISSUE 3

How can the law best provide for flexibility to respond to post-valuation property changes?

a) By making the valuation date a rebuttable presumption

b) By applying the factors in section 8 of the *Matrimonial Property Act*

c) Other (please explain)

A. Accommodating Changes by Rebuttable Presumption

[54] There are two options for the format of an express valuation date provision. While *Hodgson* provides that valuation date is a rule, it was previously thought to be a rebuttable presumption. As post-*Hodgson* cases have shown, a strict rule may be less able to accommodate changes in property value.

[53] During discussion at the seminars, many participants used the floods in Southern Alberta that occurred during the summer of 2013 as an example of a post-separation circumstance that the court should be able to consider when valuing matrimonial property.

[55] Despite the Court of Appeal's determination that valuation as of trial is a rule, not all lower courts have followed this rule. In some cases, courts have determined the value of matrimonial property as of another date. See, for example:

- *Repas v Repas* (2012): The Court valued and divided the husband's business property as of separation. The Court held that it would not be just and equitable to order an equal division of the business property as of the date of trial because "there was a real imbalance in contribution after separation." Unusual circumstances in this case included that the spouses had lived separate and apart for 19 years, and that the husband passed away approximately four years before the court's decision was issued.[54]
- *Mancini v Phelan* (2012): The Court valued many of the matrimonial assets as of a date agreed to by the spouses through their counsel.[55]
- *Yassa v Parker* (2012): Matrimonial property was valued and distributed as of separation. The Court held that valuing the property as of trial would have been unjust in light of the spouses' financial behaviour. Within a few years of separation the spouses had separated their accounts, collapsed their RRSPs, sold their matrimonial home, and both spouses had become indebted to their respective families.[56]
- *Holland v Holland* (2011): The spouses' RRSP and pension were valued and divided as of separation. After separation, neither spouse contributed to the growth of these assets for the other's

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[54] *Repas v Repas*, 2012 ABQB 572 at para 47. The remaining matrimonial property was valued as of trial.

[55] *Mancini v Phelan*, 2012 ABQB 536 at para 29. Remaining matrimonial property was valued as of trial – see para 30.

[56] *Yassa v Parker*, 2012 ABQB 167 at para 97. Given the steps taken by the spouses to live financially independently of each other since trial, the Court refused to divide their debts as of trial – see paras 94–95.

benefit. Only the matrimonial home was valued and divided as of trial.[57]

- *Mew v Mew* (2011): The spouses' assets were no longer available to be divided as of trial. The spouses had divided their monetary assets, and sold their home and divided the equity in it. The Court did not alter the division reached by the spouses. The Court noted that trying to strictly follow *Hodgson* strictly under these circumstances would result in a "futile exercise in calculation" that would involve tracing matrimonial property over a nine-year period.[58]
- *JJM v CDM (Estate)* (2008): The husband's company was valued and divided as of separation. The Court noted that after separation, the wife's conduct was of no benefit to the acquisition or maintenance of the property and was a detriment to the family. The wife had difficulties with drug and alcohol addiction, was in and out of hospitals and treatment centres, and caused significant family stress. She passed away prior to the trial.[59]

[56] If the MPA were to articulate the valuation date as a rebuttable presumption, some predictability and certainty may be lost. This result would undermine a primary advantage of using a single valuation date for all property. As before *Hodgson*, it would be open to argue about when valuation should take place and what property should be valued.[60]

[57] Setting out a rebuttable presumption would also mean addressing the circumstances in which the presumptive valuation date could be rebutted. Even with such guidance, the valuation date may be subject to varying, or even conflicting, judicial interpretations. Costs would also increase if the presumptive valuation were rebutted and the property had to be valued again.

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[57] *Holland v Holland*, 2011 ABQB 359 at paras 67–70. The Court also noted that any change in the value of the matrimonial home since separation was the result of market forces rather than ongoing contributions by the spouses.

[58] *Mew v Mew*, 2011 ABQB 531 at paras 35–41.

[59] *JJM v CDM (Estate)*, 2008 ABQB 116 at para 99.

[60] Background Paper, note 3 at para 49.

[58] However, articulating the valuation date as a presumption could also be advantageous. It would enable courts to exercise more discretion to ensure that property is valued and divided fairly and thereby respond to circumstances on a case by case basis.[61] For example, if a significant period of time had elapsed between separation and trial, as was the case in *Hodgson*, valuation at trial may be more appropriate.

[59] If the MPA were to express the valuation date as a rebuttable presumption, the following issues would also need to be addressed:

- In what circumstances can the valuation date be rebutted? For example, could the valuation date be rebutted on an asset by asset basis?
- Whether the MPA should specify what date or dates should be used to value property if the presumptive valuation date is rebutted.
- Would it be possible to rebut a valuation date agreed by the spouses?

B. Accommodating Changes under Section 8

[60] Changes could also be accommodated following the model set out in *Hodgson*. As held in *Hodgson*, if property may only be valued as of one date, the factors in section 8 can be used to address any unfairness that might arise.

[61] As noted earlier, the factors in section 8 allow the court to make an unequal distribution of section 7(4) matrimonial property and section 7(3) increases in value of exempt property where it would be just and equitable to do so. For ease of reference, section 8 provides:

> 8 The matters to be taken into consideration in making a distribution under section 7 are the following:
>
> (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

[61] Background Paper, note 3 at para 2. See also para 51.

(b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;

(c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;

(d) the income, earning capacity, liabilities, obligations, property and other financial resources

(i) that each spouse had at the time of marriage, and

(ii) that each spouse has at the time of the trial;

(e) the duration of the marriage;

(f) whether the property was acquired when the spouses were living separate and apart;

(g) the terms of an oral or written agreement between the spouses;

(h) that a spouse has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

(l) that a spouse has dissipated property to the detriment of the other spouse;

(m) any fact or circumstance that is relevant.

[62] Is section 8 adequate to accommodate a legislative change to adopt separation as the default valuation date? Arguably, yes. The factors are

framed to allow the court to resolve disputes. The factors allow the court to look back at the entirety of the marriage, ie to both pre- and post-separation conduct. While there would be an adjustment period were the valuation date to be moved from trial to separation, the transition would likely be fairly smooth. Indeed, from the post-*Hodgson* cases noted in paragraph [55], courts are already applying this approach when necessary though perhaps not expressly on the basis of a section 8 analysis.[62]

[63] A further advantage to accommodating changes under section 8 is that the jurisprudence in this area is familiar. As noted earlier, expressing the valuation date as a rebuttable presumption would require a statement of when and how the presumption is rebutted. Achieving a just and equitable distribution taking into account the section 8 factors is a familiar process and in all likelihood achieves the same result as rebutting a presumptive valuation date.

C. Recommendation

[64] On balance ALRI considers that the factors in section 8 provide the appropriate flexibility to respond to post valuation property changes. As discussed above, *Hodgson* ruled out the option of making the valuation date a rebuttable presumption. Further, any proposal of a rebuttable presumption requires a consideration of when the presumption is rebuttable and what is to happen if the presumption is rebutted.

[65] In comparison, section 8 already sets out a broad range of well-known factors with established jurisprudence for when courts consider it appropriate to consider variations to the division of property. [63]

RECOMMENDATION 3

Flexibility to respond to post-valuation property changes is best achieved by applying the factors in section 8 of *the Matrimonial Property Act*.

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[62] If the MPA were amended to specify valuation at separation, it may be necessary to consider consequential amendments to sections 7(3)(a) and 8(d) to allow the court to consider valuation date and trial if appropriate.

[63] See Jonette Watson Hamilton & Annie Voss-Altman, "The *Matrimonial Property Act*: A Case Law Review," Research Paper (2010) at 63–72, online: Alberta Law Reform Institute <www.alri.ualberta.ca/docs/OP MPA Case Law.pdf>.

[66] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

Deadline for comments on the issues raised in this document is March 1, 2015

Please respond to the online survey at http://bit.ly/mpasurvey